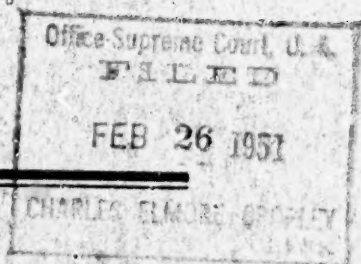


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NO. 363



In the Supreme Court of the United States

OCTOBER TERM, 1950

62 CASES, MORE OR LESS, EACH CONTAINING SIX
JARS OF JAM, ETC., ET AL., *Petitioner*

V.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for
the Tenth Circuit

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 25-27) is reported at 87 F. Supp. 735. The opinions of the Court of Appeals (R. 57-67) are reported at 183 F.2d 1014.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1950 (R. 67), and petition for rehearing (R. 67-73) was denied on July 22, 1950 (R. 78). The petition for a writ of certiorari was



filed on October 16, 1950, and was granted on November 27, 1950 (R. 79). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 403(g) of the Federal Food, Drug, and Cosmetic Act declares a food to be misbranded if it purports to be or is represented as a food for which a standard of identity has been prescribed but fails to conform to the standard. Section 403(c) provides that a food shall be deemed misbranded if it is an imitation of another food, unless its label prominently bears the word "*imitation*" in association with the name of the food imitated. The questions presented are:

1. Is a product labeled "imitation jam", which looks and tastes like jam and is accepted as jam by many consumers, but which does not conform to the standard of identity prescribed for jam, misbranded within Section 403(g) because, as the court below held, it "purports to be" and is represented as jam?

2. Is a substandard product which would otherwise violate Section 403(g), because it "purports to be" jam but fails to conform to the standard of identity prescribed for jam, saved from the condemnation of that section because it is labeled "imitation jam" and hence is not misbranded in so far as Section 403(c) is concerned?

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. §§ 301, *et seq.*, copies of which will be made avail-

able to the Court. The provisions most pertinent to this case are as follows:

Sec. 304(a) [as amended by the Act of June 24, 1948, 62 Stat. 582]. Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * * .

Sec. 401. Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: * * *

In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers; designate the optional ingredients which shall be named on the label. * * *

Sec. 403. A food shall be deemed to be misbranded * * *

(c) If it is an imitation of another food, unless its label bears, in type of uniform size

and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

* * * * *

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

The regulations establishing a standard of identity for fruit preserves or jam appear in 21 C.F.R., Sec. 29.0, 5 Fed. Reg. 3554, and are printed in the appendix to this brief.

STATEMENT

The definition and standard of identity of fruit jam was established by the Federal Security Administrator in 1940 after public hearings required by Section 701(e) (21 U.S.C. 371(e)). The legality of the regulation is not in issue. Briefly stated, the standard of identity provides that fruit jam shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients; and that the soluble solids of blackberry, strawberry, and grape jam shall be not less than 68%, and of apricot, peach and plum jam not less than 65%. 21 C.F.R., Sec. 29.0(a), 5 Fed. Reg. 3554. The foods

involved in this case admittedly do not conform to the standard (R. 12-13). They contain the ingredients provided for in the standard, but their fruit content is only 25% and this deficiency is made up by a 20% water solution of pectin (R. 22, 23, 51, 59).¹

The Pleadings. In March, 1949, a libel was filed in the United States District Court for the District of New Mexico, pursuant to Section 304(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334(a)), seeking the seizure and condemnation of 62 cases, more or less, of "jam, assorted flavors" (R. 3-4). The libel alleged that the food was misbranded within the meaning of Section 403(g) when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce in that it purported to be and was represented as fruit jam, a food for which a definition and standard of identity had been established by the Administrator, but failed to conform to the definition and standard because it was deficient in fruit and was not concentrated to the extent required by the standard (R. 3-6).

The Pure Food Manufacturing Company appeared as claimant and filed an answer admitting the interstate shipment of the food and that it failed to comply with the definition and standard of identity for fruit jam. It denied that the article purported to be or was represented as fruit jam, and alleged as an affirmative defense that the food was "imitation jam," that it was so labeled, and that Congress had "ratified the manufacture and sale in interstate commerce of 'imitation jams'

¹ The label, which states the ingredients and gives the proportions thereof, appears *infra*, p. 6.

and other 'imitation' Foods when it passed". Section 403(c) (R. 12-14.)

The Trial. A pre-trial conference in the District Court (R. 30) developed into a trial without witnesses (R. 36-37). At the court's suggestion (R. 36, 40), each attorney detailed the evidence he expected to adduce (R. 37-48) and the other agreed that the stated proof could be made (R. 43-44, 46-47). The statements of counsel were admitted as testimony on which the decision was reached (R. 48-49).

It was agreed that the composition of the food under seizure is approximately as indicated on the label (R. 51) except that "20% pectin" should "more accurately be described as a 20% pectin solution" (R. 51, 59, 22-3). The label reads as follows:²

Net Wt. ~~5 Lbs.~~ 2 Oz.

Delicious Brand

Imitation

Strawberry Jam

[or Grape, Apricot, Plum, Peach, Blackberry Jam]

made from 55% sugar, 25% fruit

20% pectin, citric acid, 1/10 of 1%

benzoate of soda

Packed by

The Pure Food Mfg. Co.

Denver, Colorado

The Government's attorney stated that his witnesses would testify (1) that the Delicious Brand

² The complete label is on an original exhibit (R. 49), but does not appear in the printed record except as a part of the Court of Appeals' opinion (R. 59). The original exhibit has been certified to this Court.

Imitation³ Jam, five-pound two ounce size, had been served in hotel dining rooms, restaurants, and other public eating places as³—and sometimes in response to requests for—fruit jam without a label or other disclosure describing it as “imitation jam” (R. 32, 34-35, 38-39, 41); (2) that retail grocery stores advertised these “imitation jams” as “strawberry jam,” “plum jam,” etc., and filled telephone orders from housewives asking for the advertised jams with Delicious Brand Imitation Jam (R. 43); (3) that ranches and logging camps served Delicious Brand Imitation Jams to their employees as fruit jam and that such employees were not shown the labels and consumed the jam mistakenly believing it to be genuine fruit jam (R. 34-35, 38, 43, 47-48); and (4) that the Delicious Brand Imitation Jam looked like jam, tasted like jam, was used as a substitute for jam, and without the label could not be distinguished by the average consumer from jam (R. 47-48). The Government refused to stipulate that the food is “imitation jam” (R. 31).

Claimant's attorney stated that his witnesses would testify that its product was wholesome and sanitary and had food value, that the labels correctly set forth the ingredients and the proportions of each in the food, that the product had been

³ An inspector of the Pure Food and Drug Administration would have testified that jam served to him in the Yucca Hotel, pursuant to a menu referring to “jellies or preserves,” was determined to be claimant's Delicious Brand Imitation Jam, that he ascertained that this jam came from a particular wholesale house, and that the product seized in this case was the “parent lot” in the wholesale house from which the Yucca Hotel jam came (R. 41-42).

manufactured as "imitation jam" for a period in excess of fifteen years, that "prior to that time"¹—the label had been changed from "compound jam" to "imitation jam" at the request of the Denver Station of the Food and Drug Administration, that the product is sold to wholesalers, that a majority is marketed through retail food stores with the label prominently displayed, but that wholesalers may, in their discretion, sell to hotels, restaurants, logging camps, and ranches, that in the majority of instances the price is 50% lower than the price of pure fruit jams, that some consumers prefer the product to pure fruit jam, that some consumers would testify that they purchased the product as imitation jam for use on the table in lieu of more expensive butter and oleomargarine (R. 44-45).

Findings and Opinions. The trial court found the facts substantially as stated by the parties (R. 21-24, 49-52), and concluded that although claimant's food did not comply with the standard of identity for fruit preserves and jam, it did not purport to be and was not anything but imitation jam, and was therefore not required to comply with the standards (R. 22-25). In its conclusions of law (R. 25), the court also held that the primary purpose of the Act "is to protect the consuming public, the ultimate consumer," that the Act was "not

¹ This request of the Food and Drug Administration, made over fifteen years before the trial, obviously antedated the 1938 statute, and thus occurred prior to the promulgation of definitions and standards of identity for jam. These pre-1938 activities lost their legal significance upon the enactment of the present statute and the adoption of the definition and standard of identity for jam.

intended primarily to protect the ultimate purchaser as distinguished from the ultimate consumer," that the word " 'purport' * * * should be construed to have its usual ordinary meaning," and "that where menus in public eating places, and employer's private dining halls offer for sale or consumption a food which simulates a standardized food, without disclosing that such article is not the standardized food, such simulated food is represented to such patrons, guests and employees, as the standardized food." In its opinion, the District Court reasoned that food branded as an imitation in compliance with Section 403(c) could not be deemed misbranded under Section 403(g) (R. 25-27). Judgment was entered on October 20, 1949, dismissing the libel (R. 28).

In reversing the judgment of the District Court, the Court of Appeals for the Tenth Circuit held, one judge dissenting (R. 57-63, 64-67), that "the jams under seizure * * * are a substandard jam. They are not imitation fruit jam. We think the undisputed facts show that they purported to be, and were represented to be a fruit jam, for which a definition and standard of identity had been prescribed" (R. 60), and that the manufacturer cannot escape the impact of Sections 401 and 403(g) by labeling such an article "imitation jam" and truthfully setting forth on the label the proportions of ingredients (R. 62-63).

SUMMARY OF ARGUMENT

I

A. Claimant's product purports to be jam within the meaning of Section 403(g). It looks and tastes like jam, has the same ingredients as jam, though with less of the principal and most expensive ingredient, the fruit. It is sometimes advertised at retail as jam and sold as jam in response to telephone orders and in public eating places. Particularly to the consumers who do not see the label, it purports to be jam and nothing else. As the trial court conceded, the statute is designed to protect such consumers with all others, and it has been uniformly construed as reaching products which might deceive or confuse them. In determining whether a product purports to be a standardized food, all pertinent factors must be considered; the word "imitation" on the label is not controlling, and indeed should be given little or no weight when a product by its inherent nature and appearance resembles a standardized article or when many consumers do not see the label.

B. Claimant's product is, in fact, an inferior grade of jam, not an imitation of jam. But even if it be assumed that "imitation jam" is truthful labeling, claimant's position is not advanced. For *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, establishes that truthful, informative labeling does not immunize a departure from the prescribed standards of identity. That decision, and the history of the Act, show that the provisions for standards of identity have a dual purpose (1) to protect the consumer against economic

adulteration by which ingredients customarily used are replaced by inferior, less expensive items, and (2) to prevent the confusion of consumers which results when various combinations of ingredients are permissible. Experience has proved, and Congress has determined, that accurate labeling is not adequate protection against these evils. Both of these objects would be frustrated if substandard products could be sold so long as they were labeled "imitation." For the word "imitation" could be used freely on any substandard foods sold in public eating places to consumers who do not see the label, and jam marked "imitation" could be prepared in any number of combinations of the orthodox ingredients in disregard of the proportion approved in the prescribed standard.

C. The legislative history of the provisions for standards of identity shows that Congress was seeking to overturn court decisions with respect to the very type of product involved in this case—jam with one half the customary fruit content marketed under another name, Bred Spred. Although there are statements in the hearings and in an early version of a committee report that no wholesome food, truthfully labeled, was being proscribed, other and subsequent statements from the same sources show that only "foods distinctive in content as well as in name," not inferior, diluted forms of a standardized article, were not to be required to comply with standards of identity. The repeated reference to the Bred Spred cases in the hearings and committee reports makes this clear. And the *Quaker Oats* case squarely holds that wholesome products not conforming to the stand-

ards may not be marketed. Here we do not have a distinctive food, but so-called "imitation" jam, which is nothing more than jam with a reduced proportion of the most valuable ingredient. There can be no doubt that Section 403(g) was meant to reach such a product irrespective of the label.

II

Section 403(c) does not exempt imitation products from the operation of Section 403(g). The former subsection provides that—

* * * A food shall be deemed to be misbranded—

* * * * *

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated,

The "unless" clause merely excepts prominently labeled imitations from the prohibition in Section 403(c) itself, not from any other part of the statute. In contrast, in the 1906 Act, imitations so labeled were specifically excepted from all the prohibitions against adulteration and misbranding. It is "impossible to say that the framers of the 1938 Act" narrowed the content of the exception for prominently labeled imitations "for the useless purpose of achieving the same result as had been reached under the 1906 Act". Cf. *United States v. Walsh*, 331 U.S. 432, 437.

The structure of Section 403 demonstrates that the various subsections defining different types of

misbranding are independent. Many of these subsections contain exceptions—"unless" clauses—similar to that in Subsection (c), and these clearly only except from the subsection in which the clause is contained. Decisions of two courts of appeals under the 1938 Act and of this Court in construing the 1906 Act have held that the definitions of the various kinds of misbranding are independent.

As has been indicated, the purpose of Section 403(g) would be defeated if a product containing a lesser amount of the principal ingredient but which, by reason of its composition, appearance, and taste, still purported to be the standardized commodity, could be freely sold if the word "imitation" were placed on the label. The legislative history upon which claimant relies did not relate to the imitation subsection (Section 403(c)), but to Section 403(g), which has already been discussed.

To hold that a product such as claimant's violates Section 403(g) does not render Section 403(c) meaningless. The latter provision still remains operative for a great many foods for which standards of identity have not been fixed, as well as for foods labeled "imitation" but not purporting to be the standardized article.

This does not mean that persons of modest means need be deprived of inexpensive and wholesome food products. But once a standard of identity has been established for a food, the proper means of marketing a less expensive, but nevertheless wholesome, product of the same type is not to violate the standard of identity with an article inappropriately labeled "imitation" but to request ad-

ministrative approval of an additional standard for the lower priced commodity. The Administrator then, after a hearing and a full record, can take into consideration both the extent to which the public would be confused or deceived by two kinds of jam, one lower in fruit content than the other, and the assumed advantage to the public in having a more economical but inferior grade of jam on the market. No such request has been made for the product marketed by claimant.

ARGUMENT

The question in this case is whether the product seized was misbranded within the meaning of Section 403(g) of the Federal Food, Drug, and Cosmetic Act, which defines food as misbranded "if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard * * *." By appropriate regulation, the Food and Drug Administrator has provided that fruit jam shall contain not less than 45 parts by weight of fruit to each 55 parts of saccharine ingredients. 5 Fed. Reg. 3554, 3557; 21 C.F.R. § 29.0 (1949). The product seized in this case contains 25 per cent fruit, 55 per cent sugar, and 20 per cent of a water solution of pectin (R. 59, 22-3; Orig. Ex. (jar with label)). The product thus contains the ingredients of jam, though in proportions which minimize the valuable ingredient. It looks like jam and tastes like jam, and many consumers purchase it or eat it in the belief that it is jam.

The precise question presented by this case is whether the fact that this product is labeled "Imitation Jam" takes it out of the purview of Section 403(g). This question has two aspects:

1. Does the fact that a product is labeled "imitation" jam conclusively estabish, despite the existence of the other factors just mentioned, that it does not purport to be jam within the meaning of Section 403(g);

2. Does Section 403(c), which defines food as misbranded

If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated,

immunize food labeled "imitation" from the requirements of Section 403(g).

I

Claimant's Product Is Misbranded in Violation of Section 403(g) Because It Purports to be Jam But Does Not Conform to the Standards Established for Jam

A. THE PRODUCT IN FACT PURPORTS TO BE JAM TO MANY OF ITS CONSUMERS.

There is no dispute as to the facts. In substance, the case was tried upon an agreed statement. The trial court found that petitioner's product "has the appearance of" standard jam and "is made to taste like and does taste like" standard jam and was "used by the consumer in place of, and as a

substitution for" standard jam. (R. 24). The court found specifically (Finding 11, R. 22):

That retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitations jams and jellies similar to the product seized in this action and that such product bore the imitation label as hereinbefore set forth.

The court also found that the product was offered to and received by patrons and employees at hotels, restaurants, ranches, and logging camps as jam, and that such persons had no opportunity of seeing the label or knowing that they were eating anything but jam (R. 23-4). The evidence was also undisputed that a majority of the product is marketed "through retail food stores to ultimate consumers" (R. 45) labeled as on the articles seized, that the price is approximately 50 per cent lower than for pure fruit jams, and that some consumers purchased the product "as imitation jam" in the large 5 lb. 2 oz. containers for use in lieu of more expensive butter and oleomargarine (R. 44-46).³ (This "majority" sold by retailers would include, of course, the goods sold by retailers to consumers in response to advertising as, or as a result of telephone orders for, jam.)

³ Finding 14 (R. 23), that "a majority of the 5 lb. 2 oz. containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes" is an inaccurate summation of claimant's offer of proof. The "majority" referred to by claimant (R. 44) were all the purchasers in retail stores, not necessarily consumers with large families using jam in lieu of butter and oleomargarine.

The trial court conceded that "purport" should be given its "usual ordinary meaning" (R. 25). As defined by the Court of Appeals for the Second Circuit, "purporting means 'to have the appearance or to convey the impression of being, meaning, or signifying (some particular thing).'" *United States v. Maguire*, 64 F. 2d 485, 491 (C.A. 2), certiorari denied 290 U.S. 645, quoting Webster's International Dictionary.

Here by its very nature—its ingredients, taste, appearance, use, etc.—claimant's product purports to be jam, wherever it may be found, and no matter how it is labeled. The fact that purchasers in retail stores have an opportunity to see the labels on the jars does not mean that for them the product does not purport to be jam. They would also be influenced by the appearance of the jar and its contents,⁶ and by their experience in tasting and using it. Certainly a purchaser who opened and tasted the product would from then on believe it to be jam regardless of the labeling. These factors, together with the label and price, would give the consumer the impression that the product was an inferior type of jam, which was true, but the purchaser, like the Court of Appeals, would not believe that the product was anything but jam. Thus, even as to purchasers aware of the labeling and price, the product would still purport to be jam.

⁶ The entire label on the large jars covers an area of two square inches. The jar has an area of approximately one hundred square inches. The word "imitation" as it appears on the label is less than one-fourth of an inch high.

But even if these consumers who saw the label are excluded from consideration, the result in this case would be the same.⁷ For claimant's product certainly both purports to be and is represented as jam to those consumers to whom it is sold and served when they ask for jam, whether in restaurants or hotels, or when retail stores advertise it as jam and send it as jam in response to telephone orders (R. 43). Such consumers do not see the label on the jars when the jam is ordered. To them it professes to be jam and nothing else. And indeed, the trial court found that as to persons in public eating places and employer's private dining hall "such simulated food is represented * * * as the standardized food" (R. 25).⁷

It is not necessary that *all* persons who consume a product be deceived for a product to be misbranded. Some persons will always read labels more carefully than others; some will not, and others cannot read them at all.⁸ Certainly if claimant's product "purports to be" and is "represented as" jam to a substantial portion of its consumers—whether or not a majority—that is sufficient.

⁷ The record contains no support for claimant's characterization of these transactions as "certain isolated instances" (Br. p. 25). The trial court made no such finding and the only evidence as to proportions was claimant's statement that "a majority" of the 5 lb. 2 oz. jars "are marketed through retail food stores" (R. 44-45). If all but "certain isolated instances" had been so marketed, claimant would doubtless have so stated.

⁸ As long ago as 1919, this Court, in a case involving a similar problem, recognized that "few purchasers read long labels, many cannot read them at all * * *". *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 487.

to violate Section 403(g). Since claimant has offered to prove only that "a majority of the five pound two ounce jars" were sold through retail stores (R. 44-45), it is apparent that a very substantial proportion was marketed through other outlets, such as restaurants, hotels, ranches, and logging camps, where the ultimate consumer would not see the label and would believe the product served to be jam.

It is established that Section 403(g) and related provisions of the Federal Food, Drug, and Cosmetic Act are violated by conduct which may not deceive or confuse an immediate purchaser of the labeled container, but which does deceive the ultimate consumer. This seems to have been conceded by the District Court. (Conclusions of Law 6-9, R. 25, quoted at pp. 8-9, *supra*.) Directly in point is *Libby, McNeill & Libby v. United States*, 148 F. 2d 71 (C.A. 2), affirming *United States v. 306 Cases Containing Sanford Tomato Catsup With Preservative*, 55 F. Supp. 725 (E.D. N.Y.), which involved catsup containing a cheap preservative which in part replaced sugar and vinegar, the ingredients approved in the standard of identity. The catsup was not sold in the ordinary bottles for household consumption, but "only in No. 10 cans (7 lbs.) to institutional users for cocktail sauces and cooking." "The evidence indicated that some of it found its way to individuals via unlabeled cruets on the counters of luncheonettes and small restaurants" (55 F. Supp., at 727). The District Court held that (*ibid*):

The Administrator may well have found that honesty and fair dealing required that patrons

of these luncheonettes were entitled to assume that the product they were using was the same tomato catsup they would purchase for home consumption. Catsup sold for home use in small bottles did not contain benzoate of soda.

The Court of Appeals affirmed, saying (148 F. 2d, at 73):

Neither the decision nor its rationalization in the Quaker Oats case, can be escaped by a product that looks, tastes, and smells like catsup, which caters to the market for catsup, which dealers bought, sold, ordered, and invoiced as catsup, without reference to the preservative, *and which substituted for catsup on the tables of low priced restaurants.* The observation in the opinion that it was the purpose of the Congress to require informative labeling "where the food did not purport to comply with a standard" is not to be lifted out of its context, given a meaning repugnant to the decision, so as to limit "purport" to what is disclosed by the label and to that alone. [Italics supplied.]

The Court of Appeals for the Sixth Circuit had come to the same conclusion in a libel against artificially colored poppy seeds sold in a properly labeled container to the wholesale purchaser, but resold for use in bakery products by the ultimate consumer.⁹ *United States v. Two Bags, Each Con-*

⁹ This and the following case arose under Section 402(b), not 403(g), but since they involved economic adulteration of the same sort as the latter provision was designed to prevent, they are equally applicable here.

taining 110 Lbs. Poppy Seeds, 147 F. 2d 123 (C.A. 6). The Court of Appeals declared (p. 127):

Here, the consumer would be unaware that less expensive ingredients had been substituted and that the article was inferior to that which he expected to receive when making his purchase. The fact that the substituted article was not deleterious is immaterial. From its inception, to its last amendment, the Pure Food and Drugs Act was not designed primarily for the protection of merchants and traders; but was intended to protect the consuming public.

* * * * *

Whether dealers or traders in articles are deceived is not the material question. The appropriate inquiry is whether the ultimate purchaser will be misled. * * *

* * * * *

The erroneous conclusion reached by the district court seems to stem from confusion concerning the primary purpose of the Act, which, as has been demonstrated, is not protection of jobbers, dealers, or traders, but protection of the ultimate consumer. * * *

The decision of the Fifth Circuit in *United States v. 26 Drums of Pop'n Oil*, 164 F. 2d 250 (C.A. 5) is to the same effect. The mineral oil to be used on popcorn sold in theatres, shipped in properly labeled drums, was held adulterated because the ultimate purchaser of the popcorn would not know that the popcorn dressing consisted of

mineral oil instead of the customary and superior butter or vegetable oil.

These cases hold, in accordance with the primary purpose of the statute, that the provisions of the Act designed to prevent economic adulteration must be construed so as to protect the ultimate consumers, including those who will not see the product in the properly labeled container. In this case, the substantial proportion of consumers who eat in hotels, restaurants, ranches or logging camps falls in this category. At least as to those consumers—and we believe also as to most others—claimant's product purported to be jam.

In determining whether a food purports to be a standardized food, many factors, such as appearance, taste, ingredients, methods of advertising, sale and distribution, must be taken into consideration. Where a food by its appearance, taste, color and ingredients simulates a standardized food, differing only in that a gelatinized solution consisting largely of water¹⁰ has replaced part of the fruit, the possibility of deception would seem to be inherent in the product itself irrespective of what it is called. Certainly the words on the label are not controlling when most other indicia lead to the conclusion that the product purports to be the standardized food. And where substantial amounts of the product are merchandised in such a manner that the ultimate consumer is given no opportunity to observe the label, the statements on the label would seem to be entitled to no weight

¹⁰ See R. 59, 23, 51, the administrative finding quoted at p. 31, *infra*, and the testimony of Mr. Campbell quoted at pp. 43-44, 46, *infra*.

at all. Indeed, although it is not necessary to go that far in this case, the *Quaker Oats* case, discussed *infra*, pp. 27-34, which holds that the statutory provision "was not a requirement of informative labeling" but a means whereby "the integrity of food products can be effectively maintained" (318 U.S. at 230), would seem to suggest that labeling is entirely irrelevant.

The District Court's findings were based on an erroneous interpretation of the law.— In this case the District Court conceded that those consumers who did not see the label would not be informed that they were consuming or eating an imitation product (Findings 18, 19, R. 23-24, 34-35), and also found that such consumers and not merely the direct purchasers are subject to the protection of the Act (Conclusions 6, 7, R. 25). The court nevertheless found that the articles of food seized "purport to be and are represented as imitation fruit preserves * * * and nothing else" (Fdg. 16, R. 23; Conc. 4, R. 24), and claimant argues that this is a finding of fact which is binding on the appellate courts because not clearly erroneous. But this ultimate finding, whether it be denominated one of fact or of law, is obviously merely the District Court's conclusion, based on the specific facts found. We submit that the finding is clearly erroneous because inconsistent with the specific factual findings already summarized—and in particular the findings as to advertising by retailers of claimant's product as jam and sales to persons who ordered jam by telephone (Fdg. 11, R. 22, *supra*, p. 16), and the findings as to consumers who were served the jam without seeing the label (Fdgs. 18-

19, R. 23-24), combined with the findings that the product looks and tastes like jam (Fdgs. 20, 21, R. 24). The inconsistency between the court's ultimate conclusion and the specific facts found shows that it erred as a matter of law in interpreting and applying the statutory terms.

Secondly, the District Court's opinion both states¹¹ and clearly shows (R. 25-7) that it rests on legal rather than on factual considerations,¹² i.e., the belief that the use of the word "imitation" in such manner as not to violate Section 403(c) precludes a finding of misbranding under Section 403(g). Thirdly, since the facts were in effect stipulated and there were no witnesses and no questions as to credibility, the District Court had no advantage over the Court of Appeals in evaluating the evidence. The Court of Appeals was therefore able to appraise the evidence—which in this case means to determine its legal consequences—as well as the District Court, and, of course, this Court is in the same position. In such circumstances, there is no reason to accord weight to the District Court's conclusion on what is, in the last analysis, a question of statutory interpretation.¹³

¹¹ "The question involved is mainly one of law" (R. 26).

¹² The same is true of the dissenting opinion in the court of appeals (R. 64-67).

¹³ As to the principle accepted in almost every circuit, with respect to the lesser weight to which a district court's findings are entitled when the evidence is entirely undisputed, see *Orvis v. Higgins*, 180 F. 2d 537 (C.A. 2), certiorari denied, 340 U.S. 810; *Bowles v. Beatrice Creamery Co.*, 146 F. 2d 774, 780 (C.A. 10); *Kuhn v. Princess Lida of Thurn and Taxis*, 119 F. 2d 704, 705-706 (C.A. 3); *Himmel Bros.*

Claimant's product was misbranded while in interstate commerce and held for sale thereafter. Claimant argues that its product has not been shown to be "misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce," as required by Section 304(a). The apparent basis for this contention is that the product was labeled as "imitation" when sold by claimant to wholesalers, by wholesalers to retailers, and by retailers to consumers. Inasmuch as the factors which caused the product to purport to be jam inhered in the article itself apart from the labeling (see pp. 17, 22, *supra*), with the result that it was economically adulterated during the course of the interstate shipment, Section 304(a) would seem clearly to have been satisfied. And whether or not the product purported to be and was represented as jam to intermediate purchasers, there can be no question that it purported to be and was represented as jam for the ultimate consumers to whom it was advertised as jam and who ordered by telephone or who were served the product in restaurants without seeing the label.¹⁴ As to these cus-

Co. v. Serrick Corp., 122 F. 2d 740, 742 (C.A. 7); *Stewart v. Gancy*, 116 F. 2d 1010, 1012-1013 (C.A. 5); *State Farm Mut. Auto. Ins. Co. v. Bonacci*, 111 F. 2d 412, 41-415 (C.A. 8); *Carter Oil Co. v. McQuigg*, 112 F. 2d 275, 279 (C.A. 7); *United States v. Mitchell*, 104 F. 2d 343, 346 (C.A. 8); *Equitable Life Assurance Society v. Irelan*, 123 F. 2d 462, 464 (C.A. 9); *Sun Insurance Office, Ltd. v. Be-Mac Transport Co.*, 132 F. 2d 535, 536 (C.A. 8).

¹⁴ As has been noted (*supra*, p. 7n.), the product represented to be "jellies and preserves" in the Hotel Yucca came from the same "parent lot" as the product seized.

tomers, the misbranding clearly occurred while the product was "held for sale * * * after shipment in interstate commerce."

The *Catsup*, *Poppy Seed*, and *Pop'n Oil* cases in the Second, Sixth and Fifth circuits, discussed at pp. 19-22, *supra*, all hold that products truthfully labeled when sold to dealers, but whose labels are not seen by the ultimate consumer, are misbranded within the reach of Section 304(a). In each of these cases, the product was seized in the container sold to the dealer—which is in fact, of course, the only point at which the adulteration or misbranding can be halted—even though the dealer might not have been deceived. In each case the contention advanced by claimant here was rejected by the court of appeals. See 148 F. 2d at 74, 164 F. 2d at 252, 147 F. 2d at 128. These decisions are therefore all inconsistent with claimant's contention that the requisites of Section 304(a) have not been satisfied in this case.

B. ~~SINCE CLAIMANT'S PRODUCT PURPORTS TO BE JAM, DEPARTURE FROM THE STANDARD OF IDENTITY IS NOT WARRANTED EVEN IF THE LABEL BE REGARDED AS TRUTHFUL.~~

Claimant contends that all of the above factors and principles are overbalanced or rendered wholly inapplicable because of the use of the word "imitation" on the label. Since the facts referred to above are not challengeable, this must mean that, as a matter of law, the word "imitation" proves that the product does not purport to be jam—even if some consumers actually think that the product is jam.

There may be reason to doubt that "imitation" is an accurate description of claimant's product. It is not an imitation of jam in the sense that it is a different product made of different ingredients which are combined to produce something that resembles jam. Claimant's product is merely jam of an inferior kind, containing all of the ingredients of jam but with the most expensive in a lesser proportion. It is thus really substandard jam, and exactly the type of product which the provision in the statute for standards of identity was designed to catch. See pp. 68-69 and legislative history, *infra*, pp. 33-53.

But even if it be assumed that "imitation" is a truthful adjective, claimant's position is no better. For the object of Sections 401 and 403(g) was to substitute standardization of the food for informative labeling as a means of consumer protection against subtle economic deception, a protection which is of special significance when the product lends itself to uses in which the consumer has no opportunity to examine the label. For "experience had shown that truthful labeling of a product was no protection to the bulk of the consuming public; if a product gave the appearance of being a certain food, the public assumed that it contained only those ingredients which were commonly associated with that food and the label was never consulted."¹⁵

The Quaker Oats case establishes that truthful informative labeling does not justify failure to con-

¹⁵ *United States v. 306 Cases Containing Sanford Tomato Catsup With Preservative*, 55 F. Supp. 725, 726 (E.D. N.Y.), affirmed, *sub nom. Libby, McNeill & Libby v. United States*, 148 F.2d 71 (C.A. 2), discussed at pp. 19-20, *supra*.

form to standards of identity. That truthful, informative labeling does not satisfy the requirements of Sections 401 and 403(g) is established by this Court's decision in *Federal Security Administrator v. Quaker Oats Co.*, 318 U. S. 218, decided in 1943. The Federal Security Administrator had approved standards of identity for "Farina" as meaning the product without vitamins added, and for "Enriched Farina" as meaning farina with a combination of specified vitamins and iron added. No provision was made for a farina enriched only by Vitamin D, and Quaker Oats Company attacked the administrative definition for excluding such a wholesome product when properly labeled. The case thus sharply contrasts with the instant case in one respect—the deviation from the standard product there sought to be approved was a healthful addition, not the substitution of an inferior ingredient, in part, for that customarily used. Nevertheless, in the *Quaker Oats* case, this Court concluded that truthful, informative labeling for a product as to which different standards of identity had been approved would not justify departure from the standards fixed. The following quotation (318 U. S., at 230-231), giving the reasons for this conclusion, on its face is much more clearly applicable to the kind of "economic adulteration" practiced in this case than to the situation in the *Quaker Oats* case itself:

Both the text and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had been prohibited by the Pure

Food and Drug Act of 1906. But it was found that such a prohibition was inadequate to protect the consumer from "economic adulteration," *by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished*, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold. Sen. Rep. No. 493, 73rd Cong., 2d Sess., p. 10; Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 10. The remedy chosen was not a requirement of informative labeling. Rather it was the purpose to authorize the Administrator to promulgate definitions and standards of identity "under which the integrity of food products can be effectively maintained" (H. R. Rep. 2139, 75th Cong. 3d Sess., p. 2; H. R. Rep. 2755, 74th Cong. 2d Sess., p. 4), and to require informative labeling only where no such standard had been promulgated, where the food did not purport to comply with a standard, or where the regulations permitted optional ingredients and required their mention on the label. §§ 403 (g), 403(i); see Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 12; Sen. Rep. No. 493, 73d Cong., 2d Sess., pp. 11-12.

The provisions for standards of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other. * * *
[italics supplied]

Section 403(g), unlike 403(h), permits no departure from the standards. The contrast between subsections (g) and (h) of Section 403 also shows that the standards of the former were not to be avoided by truthful labeling. The two subsections implement the consecutive clauses of Section 401, which provide for standards of identity and standards of quality and fill of container. Subsection (h) provides expressly that food which purports to be food for which standards of quality and fill have been prescribed and which falls below such standards shall be misbranded "unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard."¹⁶ Subsection (g), however, provides for no similar method of departing from the standard of identity on condition that the departure be manifested on the label.¹⁶ As the Court recognized in the *Quaker Oats* case, *supra*, the latter section was concerned with maintaining "the integrity of food products," not with "informative labeling."

The purpose of requiring standards of identity would be defeated if substandard products may be sold if labeled "imitation." The *Quaker Oats* case (as well as the legislative history referred to at

¹⁶ As is pointed out at pp. 35-37, *infra*, Section 403(g) was based in part upon the Butter Standard Act of 1923 (42 Stat. 1500, 21 U.S.C. 321a), which defined the minimum percent of milk fat to be contained in butter without any regard for labeling. In contrast, Section 403(h) was derived from the 1930 McNary-Mapes amendment (Act of July 8, 1930, 46 Stat. 1019), to the Food and Drug Act of 1906, which authorized the promulgation of standards of quality, condition, and fill of container for canned foods but allowed the labeling to indicate that the food fell below the prescribed standard.

pages 34-53, *infra*) shows that the purpose of the provisions for standards of identity was two-fold: (1) to protect the consumer against economic adulteration by which ingredients customarily used are replaced by inferior, less expensive, ingredients, and (2) to prevent the confusion of consumers which results when various combinations of ingredients are permissible. Both of these objects would be frustrated if substandard products could be sold so long as they were labeled "imitation".

(1) The finding of the Administrator in support of the regulations fixing standards for jam shows that an object was to prevent deception of the consumers through the use of "abnormally large quantities of pectin or acid" which enables "a substantial part of the normal fruit content of preserves to be replaced by water and excessive saccharin ingredients." (Finding 40, 5 Fed. Reg. 35 (1940).) "Such a product," the finding continues, "through its consistency and appearance, purports to be preserves and such use of pectin and acid is regarded as deceptive." This finding was directed at the very type of economic adulteration which the claimant here is practicing.

If claimant's contention is correct, it will be possible for food manufacturers to avoid compliance with the standard of identity referred to in Section 403(g) by using the adjective "imitation" in connection with any inferior or substandard product. Although a manufacturer might hesitate to use this device for foods sold in retail stores, there would be no reason for hesitancy with respect to foods which eventually reach the ultimate consumer in such a manner that he cannot see the

labeled container. This would be true not only as to almost all food sold in public eating places, such as hotels, restaurants and soda fountains, but as to products which become an ingredient in locally produced articles such as pies and cakes. As to such foods the consuming public never sees the labels and would have no means of knowing that the local distributor was foisting an inferior product upon it. It would be futile from a consumer's standpoint to establish standards of identity for foods of this type if addition of the adjective "imitation" allowed an inferior substitute legally to replace the standardized article.

(2) If manufacturers can escape the standard of identity merely by labeling a product which does not conform to the standard as "imitation," the consequence would also be to recreate the confusion which the standard was intended to eliminate. In the instant case, preserve or jam is defined as a product containing 45 parts or more of fruit to 55 parts of saccharine ingredients. One manufacturer might produce "imitation" jam with 40 parts of fruit, another with 35, another with 30, 29, 19, or 9—or any other figure less than 25—each as lawfully as claimant, for whom the proportion was 25. The truthful statement of percentages on the label would not avoid consumer confusion any more than in the *Quaker Oats* case. Purchasers either would not read or would not be aware of the significance of the statistics as to the ingredients. The prefix "imitation" would not prevent confusion for sub-standard jams of varying grades any more than would the word "jam" for the standard product.

C. THE LEGISLATIVE HISTORY OF THE ACT, READ AS A WHOLE, SHOWS THAT CONGRESS INTENDED THE STANDARDS OF IDENTITY TO PREVENT THE CHEAPENING OF FOODS, AND JAM IN PARTICULAR, THROUGH THE SUBSTITUTION OF INFERIOR INGREDIENTS.

The majority and minority of the court below each relied on portions of the legislative history to support the positions taken. There are statements in the committee reports and the hearings which indicate both that Congress was intending to reach the precise product involved in this case—jam with one-half the customary fruit content but labeled as something else—and to the effect that no wholesome food was being proscribed. If these latter remarks can be read as referring to more than a truly distinctive food, as compared with a variation of a standard food product, they are inconsistent with other statements from the same sources, and their authority has been destroyed by the *Quaker Oats* decision. For in that case, the Court said, in answer to a similar argument (318 U.S., at 232):

* * * We must reject at the outset the argument earnestly pressed upon us that the statute does not contemplate a regulation excluding a wholesome and beneficial ingredient from the definition and standard of identity of a food. The statutory purpose to fix a definition of identity of an article of food sold under its common or usual name would be defeated if producers were free to add ingredients, however wholesome, which are not within the defi-

nition. As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive. In many instances, like the present, that purpose could be achieved only if the definition of identity specified the number, names and proportions of ingredients, however wholesome other combinations might be. * * *

The history and background of the standard of identity provision, read as a whole, supports the view that the mere wholesomeness of a properly labeled variation from the standard of identity does not justify departure from the standard. The need for standards of identity arose out of the difficulties of enforcing the provisions of the 1906 Act, forbidding "economic adulteration,"-- "the cheapening of foods either through lessening the quantities of valuable constituents or through the substitution of cheaper constituents." (S. Rep. 646, 74th Cong., 1st Sess., p. 4; Dunn, p. 480.¹⁷)

Even prior to 1906, Congress authorized the Secretary of Agriculture to establish "standards of purity" for food products "for the guidance of the officials of the various States and of the courts of justice." Act of June 3, 1902, 32 Stat. 286, 296.

¹⁷ The legislative history of the Federal Food, Drug, and Cosmetic Act is collected in Dunn, *Federal Food, Drug, and Cosmetic Act* (1938), hereinafter referred to merely as Dunn.

These advisory standards were not binding on anyone. The result was that in attempting to prove adulteration, the Government first had to show that the advisory standard did in fact "represent the actual composition of the product expected by the consumer and recognized by the majority of the trade," and then that the food on trial did not comply with the standard.¹⁸ The difficulty in adding proof as to general understanding in each case handicapped enforcement and left at "a distinct disadvantage * * * ethical manufacturers who are forced to compete with products which differ from the advisory standards."¹⁹

In 1923, in order to alleviate this situation as to butter, Congress passed the Butter Standard Act (42 Stat. 1500, 21 U.S.C. 321a), which provided a definite standard for butter—80% milk fat—with no proviso for variations depending on labeling. This was the forerunner of the standard of identity provision of the present law. (See passage quoted immediately below.)

The need for making standards of identity mandatory was described in the Senate Committee Report in a predecessor to the bill which became the Food, Drug, and Cosmetic Act as follows (S. Rep. 361, 74th Cong., 1st Sess., p. 10, Dunn, pp. 245-246):

The absence of definitions and standards of identity has seriously handicapped the effec-

¹⁸ Annual Report of the Food and Drug Administration for the Fiscal Year ending June 30, 1933, p. 14, Dunn, pp. 27-28.

¹⁹ *Ibid.*

tive operation of the present law in maintaining the integrity of our food supply. The provisions of the present law, as well as those of this bill, dealing with so-called "economic adulteration", that is, the cheapening of foods either through lessening the quantities of valuable constituents or through the substitution of cheaper constituents, require definitions and standards whereby the article can be judged. For example, under the present law, and under the bill, a food is defined as adulterated if any substance has been mixed or packed with it so as to reduce its quality or strength, or if any substance has been substituted wholly or in part therefor. These provisions in themselves imply the existence of definitions and standards of identity, since no one can tell when an article is adulterated under them without first determining definitely what constitutes the unadulterated product.

In the absence of a standard for butter there existed, before Congress acted, a most chaotic condition in the sale of this commodity. Butter was found on the market with a fat content varying from about 66 to 85 percent or more. Some manufacturers deliberately worked water into their product, thus obtaining butter prices for water and at the same time curtailing the market for the dairy-farmers' butterfat. The passage of the definition and standard of identity for butter cleared up this chaotic condition to the advantage of producers of milk fat and of manufacturers, distributors, and consumers of butter. Any

product which does not meet the definition of source, or which falls below the 80-percent fat prescribed, can no longer be sold as butter. Conditions similar to those which prevailed with respect to butter exist today with many other food commodities and can be corrected only by the action here authorized. * * * [T]his will be particularly true of manufactured products composed of two or more ingredients or different values * * *.

See to the same effect the earlier Committee Report in the 73rd Congress (S. Rep. 493, 73d Cong. 2d Sess., p. 10, Dunn, pp. 118-119).

Clearly, jam, which is ordinarily composed of approximately one-half fruit, an expensive ingredient, and one-half of cheaper materials, was the very type of product which Congress had in mind. Indeed, the history of the statute shows that the article principally discussed was a substandard jam of almost the precise composition as the claimant's product here, containing one-half of the amount of fruit customarily found in jam.²⁰ This product was labeled Bred Spred. The Government brought several unsuccessful actions against that product, claiming that it was "mixed * * * in a manner whereby damage or inferiority is concealed," in violation of Section 8 of the Food and Drug Act of 1906. In *United States v. 10 Cases, More or Less, Bred Spred*, 49 F. 2d 87, the Court of

²⁰ Claimant has conceded that "no decision was as strongly stressed by the Food and Drug Administration to show the need for revision of the 1906 Act as the so-called *Bred Spred* case." (Br. p. 15).

Appeals for the Eighth Circuit held that inferiority had not been proved, saying (49 F. 2d at 90):

* * *²⁰ The word "inferiority" in the statute raises the question, What is the other member of the comparison? Or, in other words, the question, Inferior to what? * * * The mere fact that the product contained fewer strawberries than some other product, e.g., jam, does not show that Bred Spred was inferior to jam; nor does it show that a comparison with jam was called for by the statute unless Bred Spred was being palmed off on the public as jam. No showing of this kind was made.

In *United States v. 49-112 Cases of Bred Spred*, E. D. Mich., 1927,²³ reported only in White and Gates, *Decisions of Courts in Cases under the Federal Food and Drugs Act* (U. S. Department of Agriculture, 1934, p. 1204), District Judge Simons reached the same conclusion on the basis of the distinctive-name proviso in the 1906 Act, which exempted from the prohibition against adulteration and misbranding mixtures sold "under their own distinctive names" and not deleterious to health.²¹

²¹ The proviso in Section 8 of the Food and Drug Act of 1906, 34 Stat. 770, reads as follows:

Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an

The Bred Spred litigation was referred to before Congress in connection with two proposed changes in the law: The need for binding standards of identity in order to avoid economic adulteration and the elimination of the "distinctive name" proviso.²² The attention of the Congress was first called to Bred Spred in connection with the latter provision, when Mr. Campbell, the Chief of the Food and Drug Administration, referred to it during the Senate Hearings in the 73d Congress in 1934. Both because his testimony relates to the very type of product here involved and because both parties rely on portions of it, we set it forth at length so that the Court may see the complete picture. He testified:²³

MR. CAMPBELL. * * *

The litigation was based upon a product known as "Bredspred." It is an article that contains the ingredients of a preserve for which there is a more or less universally widespread understanding of the composition. The housewife ordinarily employs a pound of fruit and a pound of sugar and cooks these ingre-

imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

²² Claimant's treatment of the *Bred Spred* case as involving *only* the distinctive name proviso (Br. p. 16) disregards the real ground of the decision in the Eighth Circuit, and the importance of the case as showing the need for standards of identity to prevent the marketing of sub-standard foods.

²³ Hearings on S. 2800, 73d Cong., 2d Sess., 1934, pp. 512-514, Dunn, pp. 1122-4.

dients to the consistency of a jam or of a preserve. That product is popularly marketed in glass containers of a cylindrical character.

There was a product put on the market containing half the amount of fruit understood by the consumer to be in preserves, and half the amount adopted by manufacturers generally, thereby establishing a trade custom as to the proper proportion between fruit and sugar. This product was labeled "Bredspred." It was not sold as preserves, so far as any declaration on the label would indicate, it was sold purely as "Bredspred", under a distinctive name. The product on the retail shelf, however, was delivered repeatedly to consumers who called for jam or for preserves. It sold at a price so slightly below the standard quotations for the standard product that there was no indication to the consumer of the difference between the product "Bredspred" and the product "preserves."

* * * *

* * * There are a great many products that are sold under distinctive names. There can be no objection to the sale of a product that is not of a common character, that doesn't possess, perhaps, appearances of a common article under its own distinctive name, provided sufficient information about it is disclosed so that deception is not involved.

* * * *

Senator WHITE. May I ask what is the specific deception that you complain of in connec-

tion with that? Do you claim that there is not enough fruit matter in it, in the proportion that the public understands?

Mr. CAMPBELL. Yes; the expensive ingredient in jam or the preserve is the fruit. There is always a tendency to chisel by the reduction of that, and a corresponding increase of the sugar, or some substitute for the fruit.

* * * *

* * * the housewife understands that the preserves or jams are made from the use of a pound of fruit and a pound of sugar, approximately that, properly cooked to a certain consistency.

Senator COPELAND. "Cup for cup" is the phrase, isn't it?

Mr. CAMPBELL. Exactly. Where half the amount of fruit is used, you can see not only the deception, the cheating that is involved, so far as the purchaser is concerned, but likewise the difficulty to the farmer who grows the fruit that is utilized in this way.

Senator MURPHY. The effect is it decreases the standards and admits unfair competition to legitimate purchasers of fruit?

Mr. CAMPBELL. Quite right, sir.

Senator OVERTON. Is that "Bredspread" up to the standard of "bread-spread"?

Mr. CAMPBELL. Yes; whatever the standard of breadspread is, Senator.

Senator OVERTON. Now, as I understand, that is used in place of preserves.

Mr. CAMPBELL. Used as a preserve.

Senator OVERTON. It is not labeled a "Preserve"?

Mr. CAMPBELL. No, sir. That is the point. It is not labeled a "preserve."

Senator OVERTON. But it is sold as a preserve, and used as a preserve?

Mr. CAMPBELL. Exactly.

Senator OVERTON. Under another name?

Mr. CAMPBELL. That is right.

Senator OVERTON. There would be no objection to it if it were labeled a "preserve"?

Mr. CAMPBELL. If it were labeled a "preserve" it would be a violation of the law, and we would instantly proceed against it, but not being labeled "preserve", being labeled under its own distinctive name, it takes advantage of the proviso in the existing act which makes it possible to impose on the public and exploit it indefinitely. * * *

In the hearings before the House Committee during the 74th Congress,²⁴ Mr. Campbell referred to the Bred Spred situation as illustrative of the need for standards of identity. He stated:

Mr. CAMPBELL. * * * *

We have no legal food standards at the present time. The only basis on which we operate is common-law standards. But I read to you the provisions defining adulteration of food which contemplate the preservation of the integrity of the product and therefore do imply

²⁴ House Hearings on S. 5, 74th Cong., 1st Sess., 1935, pp. 46-47, Dunn, 1238-1239.

the existence of standards. And if there is one standard that can be effectively established as a common-law proposition it is that of preserves. It is a product that has been made in the home since time immemorial. One pound of fruit and a pound of sugar cooked to a definite consistency make preserves. That has been the common-law standard or the trade custom on the part of manufacturers throughout time.

But here is a product that looks like raspberry preserves. It tastes like raspberry preserves. It is a raspberry product. It contains only one-half of the fruit that is required under this common-law standard. Now, the advantage to a manufacturer in putting out an article of this sort, when you take into account that the costly ingredient is the fruit, as a mere competitive proposition, is instantly obvious. The extent to which it is an imposition on the consumer in purchasing that article in the belief that it had its full complement of fruit is likewise obvious.

But that product is not labeled as a preserve. It is labeled as bread spread. But, as a matter of actual commercial practice, purchasers of preserves, going into a retail store and calling for preserves, were handed this time out of mind, and it sold for almost the price that standard preserves sold for.

Mr. KENNEY. What are the other ingredients besides the fruit?

Mr. CAMPBELL. There is fruit, sugar, and a pectinous material acquired from fruit, which

is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted.

Mr. KENNEY. So that you find watered stock even in preserves.

Mr. CAMPBELL. Water is the most prevalent and cheapest of all adulterants.

Mr. CHAPMAN. What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

Mr. CAMPBELL. Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

Then follows a passage suggesting, contrary to the subsequent holding in the *Quaker Oats* case, (see pp. 33-34, *supra*) that if the product were wholesome and properly labeled, it would be unobjectionable under the statute.²⁵

Mr. CAMPBELL. It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.

²⁵ Dunn, p. 1239.

There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it.

Mr. Campbell continued to explain his views as to the meaning of the standard of identity provision as follows:²⁶

Mr. CAMPBELL. * * *

So an answer to the question how to prevent the incorporation of improper or excessive quantities of water in food products, and to eliminate the cheat that results from the sale of water at the price of food, is the provision for a legal standard for food. I do not know of any other way by which it can be done.

Mr. CHAPMAN. In other words, I understand, in taking Mr. Kenney's original illustration, if a man wants to buy cider which is 1 part cider and 2 parts water, he will have the privilege of doing that, but he will know what he is doing?

Mr. CAMPBELL. That is quite right; but if it is sold only as cider, it must have only the quantity of water that the standard permits.

Again, with reference to Bred Spred, Mr. Campbell stated:²⁷

Mr. CAMPBELL. * * *

The court held that this product was sold under its own distinctive name, and that, notwithstanding the fact that we had introduced

²⁶ Dunn, pp. 1242-43.

²⁷ Dunn, pp. 1244-46.

witnesses to show that the product was sold by retailers to consumers as preserves; the law was not violated. Our point was that the use of a distinctive name, such as "bread spread", with a package looking like preserves, did not remove the product actually from the field of preserves, and that the distinctive name proviso did not apply. That was our argument.

The court held that our reasoning was faulty, and notwithstanding the various abuses, the manufacturer was within his legal rights in putting this type of product on the market. The fault was the weakness of the law itself.

Mr. COLE. What abuse is there?

Mr. CAMPBELL. The abuse of the sale of the product as preserves, and the understanding by the consumer that it is preserves, when it is an article that carries half of the amount of fruit that it should carry, and fruit is the expensive ingredient. The consumer pays practically the price he would pay for standard preserves and is paying the price of preserves for the water.

* * * * *

Mr. CAMPBELL. * * * If there is a provision of the act for the promulgation of a legal standard, that would mean that any product sold as a preserve must comply with that standard.

Then, if a product containing one-half fruit and one-half water or some other ingredient were to be sold, and sold not as a preserve but sold as a bread spread, in order to prevent its

purchase by the consumer and its sale by the retailer as a preserve—something that actually took place in this instance—there should be a requirement that the ingredients be indicated and a statement made that the product does not comply with the standard.

* * * * *

Mr. CAMPBELL. It is bread spread; but are there not circumstances that will lead the consumer to the conclusion that this article is sold entirely and distinctly as preserves? Is there not an abuse existing there? Is there not an actual deception? Is not there a genuine imposition on consumers in the purchase of an article in the belief that it is preserves? You would not recognize the deficiency in fruit, in all probability, if you bought it and ate it.

Is there not a misleading impression created by all of the circumstances, which are in no wise effectively removed by resort to a mere name, "Bread Spread."

To my mind, the term "bread spread" is nothing more nor less than a trade mark under which this firm sells its preserves. That would be my impression.

Subsequently, the House Committee Report in 1938 used the difficulty of maintaining standards for jam as an example of what standards of identity would accomplish, saying:²⁸

Section 401 provides much needed authority for the establishment of definitions and stand-

²⁸ House Report 2139, 75th Cong., 3d Sess., 1938, p. 5, Dunn, p. 819.

ards of identity and reasonable standards of quality and fill of container for food. One great weakness in the present food and drugs law is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles as *commercial jams and preserves* and many other foods to the time-honored standards employed by housewives and reputable manufacturers. *The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.*

The Government has recently lost several cases²⁹ where such stretching in fruit was involved because the courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law. By authorizing the establishment of definitions and standards of identity this bill meets the demands of legitimate industry and will effectively prevent the chiseling operations of the small minority of manufacturers, will, in many cases expand the market for agricultural products, particularly for fruits, and finally will insure fair dealing in the interest of the consumer. [Italics supplied.]

²⁹ The cases mentioned were principally the *Bred Spread* cases referred to in the committee hearings.

It is thus plain that the need for standards to prevent the dilution of the percentage of fruit in jam was the example which Congress had primarily before it when it approved Sections 401 and 403(g). And what it sought to prevent was not merely the substitution of cheaper products for fruit, but the marketing of the substandard jam thus created under a different name, such as Bred Spred, which was not believed to save the consumer from deception and confusion. The very result which Congress sought to avert through the fixing of standards would reappear if exactly the same product, looking and tasting like jam, could be marketed by calling it "imitation" jam instead of Bred Spred. Certainly on the facts of this case, in which the product looks and tastes like jam and is often consumed or purchased in the belief that it is jam, we have the precise situation with which Congress was attempting to deal.

It is true, as has already been indicated, that there are statements in the legislative history which imply that the standards provision was not meant to prohibit the distribution of wholesome foods truthfully labelled. But we believe that all that was meant by these remarks was that *distinctive foods* were not to be suppressed, not that substandard brands of recognized foods were to be protected so long as they bore a *distinctive name*.

The testimony of Mr. Campbell before the Senate and House Committees, already quoted at length at pp. 39-47, *supra*, contains statements which look both ways on this, although, as has been

noted, he was seeking to outlaw the very type of product involved in the case at bar.³⁰

The committee reports, however, show a shift in emphasis from general statements that wholesome foods were not to be interfered with to the simple comment that standards of identity shall not apply

³⁰ The following statements seem to mean that only wholesome products which were distinctive foods were not to be barred by the standards of identity:

"There are a great many products that are sold under distinctive names. There can be no objection to the sale of a product that is not of a common character, that doesn't possess, perhaps, appearances of a common article under its own distinctive name, provided sufficient information about it is disclosed so that deception is not involved." [Dunn, p. 1123.]

"Senate 5 provides for standards. That product would be a sub-standard article and its marketing as a preserve would be proscribed." [Dunn, p. 1239.]

"It is bread spread; but are there not circumstances that will lead the consumer to the conclusion that this article is sold entirely and distinctly as preserves? Is there not an abuse existing there? Is there not an actual deception? Is not there a genuine imposition on consumers in the purchase of an article in the belief that it is preserves? You would not recognize the deficiency in fruit, in all probability, if you bought it and ate it.

"Is there not a misleading impression created by all of the circumstances, which are in nowise effectively removed by resort to a mere name, 'Bread Spread.'

"To my mind, the term 'bread spread' is nothing more or less than a trade mark under which this firm sells its preserves. That would be my impression." [Dunn, pp. 1245-6.]

The following statements suggest that no wholesome, truthfully labelled product could be prohibited:

"It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

"There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for

to "distinctive" foods. The first Senate Report, No. 493, in the 73d Congress in 1934, contained the following language quoted by claimant:³¹

It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard have been provided; but if an article is sold under a name for which a definition and standard have been provided it must conform to the

what it is, without deception, should be permitted the channels of commerce. There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.

"There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it." [Dunn, p. 1239.]

"In other words, I understand, in taking Mr. Kenney's original illustration, if a man wants to buy cider which is 1 part cider and 2 parts water, he will have the privilege of doing that, but he will know what he is doing?"

"That is quite right; but if it is sold only as cider, it must have only the quantity of water that the standard permits." [Dunn, p. 1243.]

"If there is a provision of the act for the promulgation of a legal standard, that would mean that any product sold as a preserve must comply with that standard.

"Then, if a product containing one-half fruit and one-half water or some other ingredient were to be sold, and sold not as a preserve but sold as a bread spread, in order to prevent its purchase by the consumer and its sale by the retailer as a preserve—something that actually took place in this instance—there should be a requirement that the ingredients be indicated and a statement made that the product does not comply with the standard." [Dunn, p. 1245.]

³¹ Dunn, 119-20.

regulation. This does not preclude the use of distinctive individual brands.

The second Senate Report, No. 361, 74th Congress, in March, 1935,³² was in many respects identical to the 1934 report. It repeated the language just quoted, but significantly added the following:

* * * But the loophole afforded the dishonest manufacturer by the so-called "distinctive name" proviso of the present law will be closed. Under that proviso adulterated and imitation products sold under such names were immune from action. *It is not intended that the authorization to make standards of identity shall apply to foods which are truly proprietary, that is, foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights.* [Italics supplied]

The sentences added show that the prior reference to wholesome food did ~~not~~ include adulterated or imitation brands of recognized foods, and that only "foods distinctive in content as well as in name" were not to be required to comply with standards of identity. On May 22, 1935, the Senate Committee submitted a substitute report, No. 646, 74th Congress, ~~in~~ lieu of Report No. 361.^{32a}

³² Dunn, 244-47.

^{32a} 79 Cong. Rec. 7963, Dunn, pp. 476, 480. Except for the 1938 House Report quoted at pp. 46-47, *supra*, the committee reports and debates after 1935 merely summarize the content of the pertinent statutory provisions without discussion. See, particularly, H. Rep. No. 2755, 74th Cong., 2d Sess., Dunn, pp. 550, 553; S. Rep. No. 91, 75th Cong., 1st Sess., Dunn, pp. 675, 679; S. Rep. No. 152, 75th Cong., 1st Sess., Dunn, pp. 686, 690; 81 Cong. Rec. 1962, Dunn, p. 693.

This report completely omitted all of the passage quoted from the two preceding reports, except the last sentence above (printed in italics), which refers only to "foods distinctive in content as well as in name".

These changes though unexplained, cannot be treated as unimportant. They probably reflect further consideration of the problem and a realization that the passage as originally written did not accurately reflect the purpose of the provision for standards of identity, one object of which, as we have seen, was to overcome the *Bred Spred* case. The final version of this passage in the Senate Committee reports shows that Congress meant to immunize from the standards of identity only separate and distinct food products.³³ Such an interpretation of the statute, but not one which would exempt from the standards of identity all wholesome but inferior variations of standard foods, is consistent with the basic purpose of providing standards of identity and with this Court's decision in the *Quaker Oats* case.

Here we do not have a distinctive food but so-called "imitation jam" which is nothing more than jam, with a reduced proportion of the most valuable ingredient. We think that there can be no doubt that Section 403(g) was meant to reach a product such as is here involved, irrespective of the label.

In sum, (1) claimant's product purports to be jam within the meaning of the language of Section 403(g); (2) the section is not inapplicable even if the jam be regarded as a truthfully labeled and

³³ E. g. Worcestershire sauce, shredded wheat, chili sauce (cf. catsup).

wholesome product; (3) to permit its sale as imitation jam would be inconsistent with the congressional purpose to prevent consumer deception and confusion; and (4) the legislative history, though not always with complete consistency, manifests an intention that Section 403(g) was meant to reach this type of product.

II

Claimant's Product Is Not Exempted From Section 403(g) by the "Imitation" Proviso in Section 403(c)

Section 403(c) of the Food, Drugs and Cosmetic Act provides that—

A food shall be deemed to be misbranded—

* * *

(c) If it is an imitation of another food, unless its label bears, in type ~~or~~ uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

The District Court was of the view that the case was controlled by this subsection, that if claimant's food was labeled "imitation" so as not to violate Section 403(c), it could not be unlawful under Section 403(g) (R. 26-27). The Court of Appeals, on the other hand, regarded Section 403(g) as the decisive statutory provision, and found that a substandard jam was not an imitation jam but a product purporting to be fruit jam within the meaning of that provision.

We submit that the Court of Appeals was correct. The language of the statute, its history and structure show that compliance with Section 403(c)—or any other subsection of Section 403—

does not make it unnecessary to comply with other subsections, including Section 403(g). Neither subsection need be read as superseding or impliedly repealing the other, but each is to be treated as containing an independent prohibition to be enforced in conformity with its terms.

A. THE LANGUAGE OF THE ACT IN CONTRAST WITH THE 1906 ACT.

In the first place, Section 403(g) contains no exception for food complying with Section 403(c), or any other provision of the Act. It does not provide that it will not be violated if a product not conforming to the standard but purporting to be a standardized food is labeled "imitation" in prominent lettering. Nor does Section 403(c) purport to exempt products labeled imitation from any other statutory requirement. It states merely that a food which "is an imitation" shall be deemed misbranded "unless its label bears * * * the word 'imitation'" in equal size and prominence with the name of the food imitated. The District Court, and the dissenting judge below—and claimant—mistakenly read Section 403(c) as if it contained an affirmative grant of approval to imitations properly labeled. But the "unless" clause is only a limitation upon, or exception from, the negative—the prohibition—found in Section 403(c) itself. It has no reference to and does not except from any other part of the statute.

Claimant mistakenly asserts (Br. p. 13) that "the statute plainly and without qualification states that such 'imitation jam' shall not be deemed misbranded." But this misreads the "unless" clause, which on its face only bars a charge of misbranding under Section 403(c), and does not re-

late to misbranding as defined by Section 403(g), or any other subsection of Section 403.

Claimant's argument both disregards the language of the 1938 Act and the contrast between the "unless" clause in Section 403(c) and the sweeping exemption for products labeled imitation in the 1906 Food and Drug Act. Section 7 of the earlier statute provided that food and drugs should be deemed adulterated for any one of a number of enumerated reasons, and Section 8 contained a similar enumeration for misbranding. Section 8, however, also contained the following provisions:

That for the purpose of this act an article shall also be deemed to be misbranded:

* * *

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

* * *

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients *shall not be deemed to be adulterated or misbranded* in the following cases:

* * *

Second. *In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends,*

and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale:
 * * * [Italics supplied.]

The proviso permitting the marketing of an imitation if so labeled on its face exempted such products from all of the adulteration and misbranding provisions of Sections 7 and 8 so long as the food was not harmful; the exemption was not merely from the particular paragraph to which the proviso is attached.

Comparison of the 1906 Act with the 1938 Act discloses that the proviso in the former was transferred to the "imitation" subsection, and reduced in scope from an exemption from all the misbranding and adulteration provisions to an exemption from the "imitation" subsection alone. This narrowing of the effect of the proviso, which, though unexplained, must have been deliberate, shows that the "unless" clause cannot have the effect claimant would give it here. For claimant's argument³⁴ makes it an exception to the other subsections—just as it was before—and not to the single clause to which it was transferred and confined. To paraphrase what was said in *United States v. Walsh*, 331 U. S. 432, 437, with respect to another provision of the Act, it is "impossible to say that the framers of the 1938 Act" narrowed the content of the exception for prominently labeled imitations "for the useless purpose of achieving the

³⁴ Claimant's statement (Br. p. 16) that the "imitation exemption" of the 1906 Act "was carried over to the 1938 Act as Section 403(c)" fails to recognize that the exemption was so narrowed as no longer to apply to this case. The statement on pages 18-19 of claimant's brief contains the same error.

same result as had been reached under the 1906 Act" with the language which Congress changed.

B. THE STRUCTURE OF SECTION 403 SHOWS INDEPENDENCE OF THE SUBSECTIONS.

The structure of Section 403 demonstrates that the various subsections defining different types of misbranding are independent. Each subsection defines a different method of misbranding. Certainly a product whose labeling was "false or misleading" in violation of Section 403(a) or whose container was so made as to be misleading (Section 403(d)), or which, if not subject to the standards of identity required by Section 403(g), was not labeled as not to disclose all the names of ingredients (Section 403(i)), could not escape condemnation because it was labeled "imitation" so as not to violate Section 403(c). Subsection (g) is neither more related to nor dependent upon subsection (c) than are any of these subsections.

Many of the subsections contain "unless" clauses similar to that in subsection (c). See Section 403 (c), (e), (g), (h), (i), (j), (k). Each of these clauses defines situations to which the prohibition in the same subsection is inapplicable. None of them purports to exempt the situations described from the other subsections. Thus subsection (k) provides that a food is misbranded "if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, *unless it bears labeling stating that fact*". [Italics supplied] Nevertheless, catsup containing a preservative and labeled so as to disclose that fact, and therefore not in violation of subsection (k), was found to be in violation of subsection (g) because not in conformance with the standard of identity. *Libby,*

McNeill & Libby v. United States, 148 F.2d 71 (C. A. 2), discussed *supra*, pp. 19-20. The same would clearly be true as to food "represented for special dietary uses" but accurately labeled and therefore not in violation of subsection (j) and of food for which standards of quality or fill had been fixed, but accurately labeled and therefore not in violation of subsection (h). No such product could escape compliance with standards of identity prescribed under Section 401 and enforced by Section 403(g) by reason of their failure to violate these other subsections. Subsection (c) stands in no different position.

In a converse situation the Court of Appeals for the Eighth Circuit held that Section 403(c) was independent of the provision for standards of identity, so that compliance with the latter would not necessarily immunize a product from the former. In *Land O'Lakes Creameries v. McNutt*, 132 F.2d 653, the order fixing standards of identity for oleomargarine was challenged by butter manufacturers on the ground that it was repugnant to subsection (c) since it did not require oleo to be labeled imitation butter. As one reason for rejecting this contention, the court pointed out that Section 403(c) and Section 401, providing for standards of identity, were "independent", saying (132 F.2d 659):

But if § 403(c) requires that oleomargarine containing the optional ingredients specified in the standard be labelled "imitation butter," it is our opinion that the respondent's order cannot be invalidated for that reason, *because we regard § 403(c) as independent of § 401*. If § 403(c) imposed the duty upon the re-

spondent to require all oleomargarine containing the ingredients designated in the standard as optional, to be labelled "imitation butter," that duty existed both before and after the order was made, since the order does not impair, or purport to impair, the effectiveness of § 403(c). The order establishes a definition of a food product, and is not a license, to those who produce it, to violate any state or federal labelling requirements. [Italics supplied.]

C. JUDICIAL INTERPRETATION OF SIMILAR PROVISIONS OF THE 1906 ACT AS INDEPENDENT.

It is also of significance that this Court had previously construed the section of the 1906 statute which enumerated different kinds of misbranding as stating independent offenses. Thus, in *Weeks v. United States*, 245 U. S. 618, the Court rejected the argument that because the ingredients of an article were accurately stated on the label, in compliance with the first paragraph of Section 8 of the 1906 Act, the article could not be misbranded under another subsection of Section 8 because "offered for sale under the distinctive name of another article". The Court stated in this connection (245 U. S. at 621-622):

It is apparent that the statute specifies and defines at least two kinds of misbranding,—one where the article bears a false or misleading label, and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one,

but not of the other. No doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced. Evidently each is intended to cover a field of its own, for otherwise there would be no occasion for specifying and defining both.

The Court had similarly held that the adulteration and misbranding provisions of the 1906 Act were independent, saying that a product accurately branded could nevertheless be found to violate the adulteration section. In *United States v. Coca Cola Co.*, 241 U. S. 265, 278, the Court pointed out:

'Adulteration' is not to be confused with 'misbranding.' The fact that the provisions as to the latter require a statement of certain substances if contained in an article of food, in order to avoid 'misbranding' does not limit the explicit provisions of § 7 as to adulteration. Both provisions are operative. Had it been the intention of Congress to confine its definition of adulteration to the introduction of the particular substances specified in the section as to misbranding, it cannot be doubted that this would have been stated, but Congress gave a broader description of ingredients in defining 'adulteration.'

These cases are plainly in point, since claimant is contending here that because its product is labeled so as not to violate the imitation provision in Section 403(c) it cannot be found to violate Section 403(g) which, though found in the section dealing with misbranding, actually is con-

cerned with the evil of economic adulteration. See legislative history summarized at pages 33-53, *supra*, and the *Quaker Oats* case. Inasmuch as the structure of the 1938 Act follows that of the 1906 Act in prohibiting a number of separate kinds of misbranding and adulteration, it must be assumed that Congress intended that the judicial interpretation of the older statute as containing independent requirements should be carried over to the new law.

**D. PURPOSES OF STANDARDS OF IDENTITY PRECLUDE
EVASION BY CALLING SUBSTANDARD PRODUCT
"IMITATION".**

We have pointed out (*supra*, pp. 31-32, 49) that to allow a substandard product, which to consumers would seem to be a kind of jam, to be sold in contravention of the standard of identity fixed for jam under Sections 401 and 403(g) would defeat the purposes of these provisions even if the product were labeled "imitation". One object of those provisions, as the *Quaker Oats* case recognizes, was to eliminate consumer confusion resulting from multitudinous—though not necessarily major—variations in the combinations of ingredients of which a product could be composed. To permit substandard jam to be sold as "imitation jam" would permit the sale of any number of combinations containing less than the 45 parts of fruit required by the standard of identity. See p. 32, *supra*. The other object of requiring standards of identity, as shown by the history of the statutory provision (pp. 28-29, 33-53, *supra*), was to facilitate the enforcement of the prohibition against

economically adulterated or "watered" foods by establishing a standard to which food products would be required to conform. That purpose would be defeated if a product containing a lesser amount of the principal ingredient, but which by reason of its composition, appearance and taste still purported to be the standardized commodity, could be freely sold if the word "imitation" were placed on the label.

The excerpts from the legislative history on which claimant relies, and which have been discussed above, did not suggest that compliance with the requirements of Section 403(c) for imitations would be an exception to Section 403(g). None of these statements related to or even mentioned the imitation provision. The point under discussion was whether compulsory standards of identity would have the effect of preventing the marketing of wholesome, truthfully labeled products. As to this, the controversy as to the meaning of Sections 401 and 403(g) was set to rest by the *Quaker Oats* decision. Nothing in the history of the statute warrants using Section 403(c) as a means of reviving the issue as to the application of the standards of identity to wholesome articles. This would seem particularly true for substandard jam—the product which Congress thought best illustrated the need for binding standards of identity.

E. THE ADMINISTRATIVE INTERPRETATIONS.

It is true that during the first few years after passage of the 1938 statute, the Food and Drug Administration, in letters to the trade, sanctioned the use of the word "imitation" on labels of articles

which did not meet the standards of identity. Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act, 1948-1949*, pp. 627-8, 640-1, 712.³⁵ These interpretations resulted from administrative uncertainty as to how far the new Act went in prohibiting wholesome products, truthfully labeled, which purported to be standard foods.³⁶ Later, in the *Quaker Oats* case, *supra*, decided in 1943, this Court concluded that Congress deliberately adopted standards of identity as a substitute for informative labeling. It was in reliance upon

³⁵ The status of this correspondence is described by the authors of the compilation cited in the text as follows (p. 561):

This part sets forth informal opinions rendered by the Food and Drug Administration on many problems which have arisen under the Act. These opinions are excerpts from day-by-day replies to inquiries concerning the application of the statute to specific problems. They represent the attitude of the Administration in the light of the facts submitted and other available information. Thus, the views expressed are subject to modification by the Administration as additional facts may become available and controlling decisions are rendered by the Federal courts.

³⁶ This uncertainty is reflected in one of the letters, which states (*id.*, at 641):

This product does not conform with the definition and standard of identity for tomato puree and is therefore misbranded. In view of the silence of the new Act in regard to the status of a food failing to meet the definition and standard of the food it purports to be, we have serious doubt as to the legality of this product, but we believe that if it were legal under any form of labeling it would have to be labeling which designates the product as "Imitation Tomato Puree" in conformity with Section 403(e).

this decision that the Administration reversed its former policy. In 1945 the Administrator specifically rescinded a prior interpretation permitting pineapple preserves not complying with the standards of identity to be sold as imitation pineapple preserves (*id.*, at 746).³⁷ It should be noted that this clear statement of the Administrator's position with respect to the labeling of preserves as "imitation" was issued four years before the institution of the instant case. There is, therefore, no basis for petitioners' contention that they were misled or trapped by "a swift change" of administrative policy.

We submit that these informal administrative interpretations, abandoned four years before the present proceeding was begun, are not in harmony with the statutory scheme as described in the above pages, nor with the reasoning of this Court in the *Quaker Oats* case. Since the Administrator himself has concluded that the original interpretation was erroneous and has abandoned it, it is no longer entitled to weight. The Administrator has, of course, both the right and duty to reconsider his

³⁷ This interpretation reads in part as follows (p. 746):

Further consideration of the matter in the light of recent court decisions has led us to conclude that products of this type are illegal under any form of labeling. It is not difficult to manufacture pineapple and sugar mixtures so as to contain not less than 68 per cent soluble solids and to otherwise conform to the standard for pineapple preserve in every particular.

On and after May 15, 1945, shipments of such illegal articles will be denied entry. Previously issued administrative opinions which are not in accord with this notice are hereby rescinded.

prior views and to follow what he now believes to be the correct construction of the law. Cf. *Helvering v. Reynolds*, 313 U. S. 428, 432; *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 100-101.

F. THE FACT THAT A SUBSTANDARD PRODUCT CANNOT BE LEGITIMATIZED BY THE INSERTION ON ITS LABEL OF THE WORD "IMITATION" OR SOME DISTINCTIVE NAME DOES NOT RENDER SECTION 403(c) MEANINGLESS.

Claimant has argued that the decision below, and the Government's construction of the Act, render the "unless" clause for imitations in Section 403(c) meaningless. In this connection, claimant points to Section 502(i), which prohibits the imitation of drug products without exception, and asserts that the contrast between this provision and Section 403(c), which deals with imitation foods, shows that the latter was not to be read as containing an unqualified prohibition. We do not disagree with this conclusion, but with the premise that to construe Section 403(g) as reaching imitations which purport to be foods for which standards of identity have been established, renders the "unless" clause in Section 403(c) meaningless.

Nothing in Section 403(g) can conceivably make the "unless" clause inoperative as to foods for which standards of identity have not been established. This leaves Subsection (c) effective as to a great many foods, such as fresh or dried fruits and vegetables, which are exempted by the statute, meat, fish, poultry, soups, sugar and seasoning, baked goods, confectionery, nuts, fruit juices, marmalade, starches and baking powder, breakfast

cereals (except farina), coffee and tea, vegetable oils, lard and shortenings, ^{some} canned fruits, pudding and dessert mixes, rice, and flavoring extracts.³⁸

Conceivably, even where standards have been prescribed, an imitation which so differed from the standardized article as not to "purport" to be that article would not be affected by Section 403(g).³⁹

In each case a question of fact would be presented—does the "imitation" product, by its taste, appearance, method of distribution, etc., purport to be the standardized article and thereby create the possibilities of consumer deception presented by this case.

But if imitations are not permissible for standardized foods, it is because that result is required by the language of the statute. For the word "purports" in Section 403(g) is broader than and inclusive of the concept embodied in the word "imitation." Claimant has admitted (Br. pp. 23-24) that both words are employed with their ordinary meanings. Something which "stimulat[es] something superior" (claimant's definition of imitation

³⁸ Standards of identity have been prescribed only for the following foods as of this date: cacao products; cereal products; macaroni and noodle products; processed milk products and cream; cheeses and cheese products; ^{ice cream} canned fruits; fruit preserves, jellies and butters; raw oysters and canned oysters; egg products; oleomargarine; canned vegetables; tomato products; salad dressing (21 C. F. R. §§ 14-53, inclusive).

³⁹ Thus, if a manufacturer distributed a product which tasted like jam but did not look like jam, and sought to sell it in a box which in no way resembled the familiar jar of jam, he might call it "Imitation Jam"—for no one would think such a product was jam.

(Br., p. 24) taken from Webster's Dictionary) would normally purport to be the object simulated. Thus, there is no reason for surprise that the natural effect of Section 403(g) is to leave very little, if any, room for play for the "unless" clause in Section 403(c), in so far as standardized foods are concerned.

We have already noted (p. 27, *supra*), and the court below seemingly held (R. 60), that it may be inappropriate to describe a substandard variation of a standardized article as an imitation. The word "imitation," as used in the statute, would seem to connote a different commodity to be used in lieu of the food imitated; indeed, Section 403(c) requires the imitation to be of "*another* food" which strongly suggests that a mere inferior brand of the imitated food was not meant to be protected. All ingredients of the seized product are required or may be used in making jam. The seized product looks and tastes like jam and is packaged like jam. Its fundamental difference from standard jam lies in the substitution of a pectin solution—that is, pectin and water—for a substantial part of the fruit, but it remains jam—a cheapened or debased or adulterated jam, and not "another food." A recent discussion of this problem concludes that, in any event, "‘cheapened,’ ‘debased’ foods were to be denied the channels of interstate commerce." After referring to Bred Spred as the specific "target" of Section 403(g), the author states:

There is nothing to be found in the legislative history nor in provisions of these sections which suggests in the slightest that any food, being an outlaw of commerce by reason of the

fact that it is lacking in its required integrity, may be restored to a lawful state by labeling it "imitation".⁴⁰

G. WHERE A STANDARD OF IDENTITY HAS BEEN ESTABLISHED, THE PROPER METHOD OF MARKETING AN ARTICLE WHICH DOES NOT CONFORM TO THE STANDARD IS TO REQUEST THE ADMINISTRATOR TO ESTABLISH AN ADDITIONAL STANDARD, NOT TO SELL IN VIOLATION OF THE STANDARD UNDER A DIFFERENT NAME.

The court below was concerned with the effect of its decision as depriving persons of modest means of an inexpensive and wholesome food product. To avoid this result, the court below stated that a substandard jam could be marketed under some other name than jam, such as "syrup and fruit thickened with pectin." (R. 63.) This dictum seems to approve the precise practice involved in the *Bred Spred* cases—and the one thing clear in the history of this statute is that Congress was seeking to overturn those decisions.

We are of the view that the court below suggested the wrong solution to the problem. If a product purports to be jam by reason of its appearance, composition, taste, advertising, or the manner in which it is distributed and consumed, it must conform to the definition and standard of identity fixed for jam and its label must bear the name "Jam" or the synonym "Preserve." Section 403(g) requires this. The standard cannot be

⁴⁰ Markel, *The Law on Imitation Food*, 5 Food, Drug and Cosmetic Law Journal 145, 164-7, April 1950, which extensively reviews the authorities with respect to the meaning of "imitation."

evaded by labeling a low-fruit jam as "Bred Spread," "Imitation Jam," or "Syrup and Fruit Thickened with Pectin"; 403(g) contains no escape provision like those in 403(h) for substandard quality and substandard fill of container.

If, because of the reduced price of low-fruit jam or for any other reason, its marketing is thought to be in the public interest, the proper remedy is to apply to the Administrator for an additional definition and standard of identity—one for low-fruit jam. Just as the Administrator could fix standards for cocoa and low-fat cocoa (21 CFR 14.4, 14.5), cream cheese and neufchatel cheese (21 CFR 19.515, 19.520), he could fix standards for jam and low-fruit jam.⁴¹

Although the Administrator's finding 40 (5 FR 3556, September 5, 1940, *supra*, p. 31) indicated that low-fruit jam thickened with pectin was then regarded as deceptive to the consumer, if the claimant can present reasonable grounds for belief that conditions have so changed that such products would now be advantageous to the public, the Administrator would hold a public hearing (Sec. 701(e)) at which full facts could be brought forth. In determining whether a standard for low-fruit jam would promote honesty and fair dealing in the interest of consumers the Administrator would take into consideration the extent to which the

⁴¹ Claimant has referred to the establishment of standards of identity for these commodities as inconsistent with the position taken by the Administrator as to jam. But the proper method of determining whether jam and so-called "imitation jam" similarly qualify for two standards of identity is in a proceeding to establish an additional standard, not by disregarding the only standard which has been approved.

public would be confused or deceived by low-fruit jam and the claimed advantage to the public in having a cheaper fruit spread on the market.

Neither the claimant nor anyone else has asked the Administrator to establish a standard of identity for low-fruit jam. If such a request were received, the entire problem could be explored and a record made upon the basis of which the matter could be decided by the Administrator. But so long as the standard for jam remains unamended and unsupplemented by one for low-fruit jam, products of the composition of claimant's will remain illegal.

CONCLUSION

For the reasons herein stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

FRUIT PRESERVES AND JELLIES; DEFINITIONS AND
STANDARDS OF IDENTITY

21 CFR 29.0, pp. 81-84 (1949 ed.)

§ 29.0 *Preserves, jams; identity; label statement of optional ingredients.* (a) The preserves or jams for which definitions and standards of identity are prescribed by this section are the viscous or semi-solid foods each of which is made from a mixture composed of not less than 45 parts by weight (see paragraph (c) of this section) of one of the fruit ingredients specified in paragraph (b) of this section to each 55 parts by weight (see paragraph (c) (1) of this section) of one of the optional saccharine ingredients specified in paragraph (d) of this section. Such mixture may also contain one or more of the following optional ingredients:

(1) Spice.

(2) A vinegar, lemon juice, lime juice, citric acid, lactic acid, malic acid, tartaric acid, or any combination of two or more of these, in a quantity which reasonably compensates for deficiency, if any, of the natural acidity of the fruit ingredient.

(3) Pectin, in a quantity which reasonably compensates for deficiency, of any, of the natural pectin content of the fruit ingredient.

(4) Sodium citrate, sodium potassium tartrate, or any combination of these, in a quantity the proportion of which is not more than 3 ounces avoirdupois to each 100 pounds of the saccharine ingredient used.

(5) Sodium benzoate or benzoic acid or any combination of these, in a quantity reasonably necessary as a preservative.

Such mixture, with or without added water, is concentrated by heat to such point that the soluble solids content of the finished preserve is not less than 68 percent if the fruit ingredient is specified in Group I of paragraph (b) of this section, and not less than 65 percent if the fruit ingredient is specified in Group II of paragraph (b) of this section. The soluble solids content is determined by the method prescribed in "Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists" Fourth Edition, page 320 [Ed. note, 6th edition, p. 383], under "Soluble Solids in Fresh and Canned Fruits, Jams, Marmalades, and Preserves—Tentative", except that no correction is made for water-insoluble solids.

(b) The fruit ingredients referred to in paragraph (a) of this section are the following mature, properly prepared fruits which are fresh, frozen, and/or canned:

GROUP I

Blackberry (other than dewberry).
 Black raspberry.
 Blueberry.
 Boysenberry.
 Cherry.
 Crabapple.
 Dewberry (other than boysenberry, loganberry, and youngberry).
 Elderberry.
 Grape.

GROUP I (Continued)

Grapefruit.
 Huckleberry.
 Loganberry.
 Orange.
 Pineapple.
 Raspberry, red raspberry.
 Rhubarb.
 Strawberry.
 Tangerine.
 Tomato.
 Yellow tomato.
 Youngberry.

Any combination of two, three, four, or five of such fruits in which the weight of each is not less than one-fifth of the weight of the combination; except that the weight of pineapple may be not less than one-tenth of the weight of the combination.

GROUP II

Apricot.
 Cranberry.
 Damson, damson plum.
 Fig.
 Gooseberry.
 Greengage, greengage plum.
 Guava.
 Nectarine.
 Peach.
 Pear.
 Plum (other than greengage plum and damson plum).
 Quince.
 Red currant, currant (other than black currant).

Any combination of two, three, four, or five of such fruits, or one or more of such fruits with one or more of the individual fruits specified in Group I, in which the weight of each is not less than one-fifth of the weight of the combination; except that the weight of pineapple may be not less than one-tenth of the weight of the combination.

Any combination of apple and one, two, three, or four of the individual fruits specified in this group or Group I in which the weight of each is not less than one-fifth, and the weight of apple is not more than one-half, of the weight of the combination; except that the weight of pineapple may be not less than one-tenth of the weight of the combination.

In any combination of two, three, four, or five fruits, each such fruit is an optional ingredient. For the purposes of this section, the word "fruit" includes the vegetables specified in this paragraph.

(c) Any requirement of this section with respect to the weight of any fruit, combination of fruits, or fruit ingredient means:

(1) The weight of fruit exclusive of the weight of any sugar, water, or other substance added for any processing or packing or canning, or otherwise added to such fruit;

(2) In the case of fruit prepared by the removal, in whole or in part, of pits, seeds, skins, cores, or other parts, the weight of such fruit exclusive of the weight of all such substances removed therefrom; and

(3) In the cases of apricots, cherries, grapes, nectarines, peaches, and all varieties of plums, whether or not pits and seeds are removed therefrom, the weight of such fruits exclusive of the weight of such pits and seeds.

(d) The optional saccharine ingredients referred to in paragraph (a) of this section are:

(1) Sugar.

(2) Invert sugar sirup.

(3) Any combination composed of optional saccharine ingredients (1) and (2).

(4) Any combination composed of corn sugar or dextrose and optional saccharine ingredient (1), (2), or (3).

(5) Any combination composed of corn sirup and optional saccharine ingredient (1), (2), (3), or (4), in which the weight of the solids of each component is not less than one-tenth of the weight of the solids of each combination and the weight of corn sirup solids is not more than one-half of the weight of the solids of such combination.

(6) Honey.

(7) Any combination composed of honey and optional saccharine ingredient (1), (2), or (3), in which the weight of the solids of each component except honey is not less than one-tenth of the weight of the solids of such combination and the weight of honey solids is not less than two-fifths of the weight of the solids of such combination.

(e) For the purposes of this section:

(1) The weight of any optional saccharine ingredient means the weight of the solids of such ingredient.

(2) The term "sugar" means refined sugar (sucrose).

(3) The term "invert sugar sirup" means a sirup made by inverting or partly inverting sugar or partly refined sugar; its ash content is not more than 0.3 percent of its solids content, but if it is made from partly refined sugar, color and flavor other than sweetness are removed.

(4) The term "corn sugar" means refined anhydrous or hydrated dextrose made from corn-starch.

(5) The term "dextrose" means refined anhydrous or hydrated dextrose made from any starch.

(f) The name of each preserve or jam for which a definition and standard of identity is prescribed by this section is as follows:

(1) If the fruit ingredient is a single fruit, the name is "Preserve" or "Jam," preceded or followed by the name or synonym whereby such fruit is designated in paragraph (b) of this section.

(2) If the fruit ingredient is a combination of two, three, four, or five fruits, the name is "Preserve" or "Jam," preceded or followed by the words "Mixed Fruit" or by the names or synonyms whereby such fruits are designated in paragraph (b) of this section, in the order of predominance, if any, of the weights of such fruits in the combination.

(g) (1) When optional ingredient (a) (1) is used, the label shall bear the word "Spiced" or the statement "Spice Added" or "With Added Spice"; but in lieu of the word "Spice" in such statements the common name of the spice may be used.

(2) When optional ingredient (a) (5) is used, the label shall bear the words "Sodium Benzoate" or "Benzoic Acid," or "Sodium Benzoate and Benzoic Acid," as the case may be, followed by the words "Added as Preservative."

(3) When optional saccharine ingredient (d) (5) or (d) (7) is present, the label shall bear the names of the components of the combination whereby such components are designated in paragraph (d) of this section, in the order of predominance, if any, of the weights of such components in the combination. Such names shall be preceded by the words "Prepared with".

(4) When optional saccharine ingredient (d) (6) is used, the label shall bear the statement "Prepared with Honey".

(5) When the fruit ingredient is a combination of two, three, four, or five fruits and the preserve is designated on its label by the name "Preserve" or "Jam" preceded or followed by the words "Mixed Fruit", the label shall bear the names or synonyms whereby such fruits are designated in paragraph (b) of this section, in the order of predominance, if any, of the weights of such fruits in the combination.

(6) Wherever the name specified in paragraph (f) of this section appears on the label of the pre-

serve so conspicuously as to be easily seen under customary conditions of purchase, the words and statements specified in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name, without intervening written, printed, or graphic matter, except that the varietal name of the fruit used in preparing such preserve may so intervene.